OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 00-01 February 3, 2000

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Leonard R. Page, General Counsel

SUBJECT: Guideline Memorandum Concerning Frontpay

1. Introduction; frontpay in the federal courts

OM Memorandum 99-79, dated November 19, 1999, instructed Regions, inter alia, to consider the issue of front pay as a remedy in an appropriate case. This memorandum more fully explores the frontpay remedy and in what circumstances it would be appropriate to seek such a remedy.

In recent years, the federal courts have granted frontpay under a number of federal statutes:

ADEA and Title VII;[1] the Family and Medical Leave Act and the Disabilities Act;[2] the Surface Transportation Assistance Act;[3] the Rehabilitation Act;[4] the Pregnancy Discrimination Act;[5] 42 U.S.C. Sec. 1983;[6] ERISA;[7] Section 301;[8] and the FLSA.[9]

2. Frontpay defined; frontpay as an alternative to reinstatement

Frontpay is a monetary award for loss of anticipated future earnings resulting from past discrimination. It is "the salary that an employee would have received had he or she not been subjected to unlawful discrimination of his employer, subject to the employee's mitigating his or her damages."[10]

The federal courts treat frontpay as an alternative remedy to reinstatement.[11] In general, the courts have been granting frontpay when they regarded reinstatement as impossible or otherwise not feasible.[12] Thus, frontpay has been awarded in circumstance where there was extreme sexual harassment by supervisors which lead to the discriminatee's nervous breakdown;[13] or when the discriminatee is close to retirement age and can't find the same kind of job;[14] or when the court thought that reinstatement would "unduly disrupt" the operations of the entity;[15] or when the court was reluctant to require bumping;[16] or when there was an employer reorganization and the employer could not establish that absent the discrimination it would not have retained the employee;[17] or when there was animosity between the parties;[18] or when the court had already awarded liquidated damages to the plaintiff.[19]

3. Technical problems in applying the frontpay remedy

Computing frontpay is often very difficult. Initially, the courts were unfriendly to the remedy because it involved speculation about the future, but the aversion to frontpay has lessened.[20] Nonetheless, the calculation remains complex,[21] and the court must take many relevant factors into account. Thus:

Numerous factors are relevant in assessing front pay, including life expectancy, salary and benefits at the time of termination, any potential increase through regular promotions and cost of living adjustment, the reasonable availability of other work opportunities, the period within which a plaintiff may become re-employed with reasonable efforts, and methods to discount any award to present net value.[22]

The plaintiff must submit enough evidence to enable the court to make a reasonable projection of future loss of income.[23] At times plaintiffs rely on expert witnesses.[24] The determination of frontpay most closely resembles determination by a jury of future lost wages occasioned by, e.g., an automobile accident.[25]

On the other hand, as a practical matter, the duration of the frontpay awarded is often short.[26]

4. Frontpay is not a replacement for the Board's standard remedy of reinstatement.

The standard Board remedy for discriminatory discharges should continue to be reinstatement. Reinstatement better effectuates the purposes and policies of the Act because it restores the employee to the circumstances that existed prior to the Respondent's unlawful action, or that would be in effect had there been no unlawful action.

However, there are some limited areas in which reinstatement is either impossible or highly undesirable and where it would be appropriate to seek frontpay as a remedy. They include:

(a) where the wrongdoer has impaired his victim's ability to work, as when the Respondent's unlawful conduct led the discriminatee to a nervous breakdown or other physical impairment associated with the ULP, or the victim obtained interim employment and suffered a debilitating injury and cannot be reinstated.

(b) where the employer remains hostile to the employee and the employees presently at work are also hostile to the discriminatee, and the union is no longer seeking representation rights.

(c) where the discriminatee is close to retirement.

(d) as a substitute for a preferential hiring list.

Regions should submit to the Division of Advice cases which involve the above situations. Any question concerning the implementation of this memorandum should be addressed to the Division of Advice.

/s/
L.R.P.

cc: NLRBU

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[1] McKenon v. Nashville Banner Publishing Co., 513 U.S. 352, 358 (1995); Gottheart v. National R.R. Passenger Corp., 191 F.3d 1148, 1154 (9th Cir. 1999); Hudson v. Reno, 130 F.3d 1193, 1203 (6th Cir. 1997), cert. denied ___ U.S. ___, 119 S.Ct. 64.

[2] See Churchill v. Star Enterprises, 183 F.3d 184 (3d Cir. 1999).

[3] BSP Trans, Inc. v. U.S. Department of Labor, 160 F.3d 38, 46 (1st Cir. 1998).

[4] See Meester v. Runyon, 149 F.3d 855, 856 (8th Cir. 1998), cert. denied ___ U.S. ___, 119 S.Ct. 2018.

[5] See DeJarnette v. Corning, Inc., 133 F.3d 293, 297 (4th Cir. 1998).

[6] Mason v. Oklahoma Turnpike Authority, 115 F.3d 1442, 1458 (10th Cir. 1997).

[7] See Musick v. Goodyear Tire & Rubber Co., Inc., 81 F.3d 136 (11th Cir. 1996), cert. denied ___ U.S. ___, 117 S.Ct. 389.

[8] United Paperworkers Intern. Union, AFL-CIO, Local 274 v. Champion Intern. Corp., 81 F.3d 798, 805 (8th Cir. 1996).

[9] Avitia v. Metropolitan Club of Chicago, Inc., 49 F.3d

1219, 1231 (7th Cir. 1995).

[10] **Hudson v. Reno, 130 F.3d at 1203; Downes v. Volkswagen of America, Inc., 41 F.3d 1132, 1141 (7th Cir. 1994).**

[11] **Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1103 (3rd Cir. 1995); James v. Sears, Roebuck & Co., Inc., 21 F.3d 989, 997 (10th Cir. 1994) (mutually exclusive remedies). See also U.S. v. Burke, 504 U.S. 229, 239 fn. 9 (1992). But see Selgas v. American Airlines, Inc., 104 F.3d 9, 12-13 (1st Cir. 1997) (frontpay until reinstatement).**

[12] **Davoll v. Webb, 194 F.3d 1116, 1144 and fn. 19 (10th Cir. 1999); Banks v. Travelers Companies, 180 F.3d 358, 364 (2nd Cir. 1999); Newhouse v. McCormick & Co., Inc., 110 F.3d 635, 641 (8th Cir. 1997).**

[13] **Stoll v. Runyon, 165 F.3d 1238, 1241 (9th Cir. 1999).**

[14] **Kelley v. Airborn Freight Corp., 140 F.3d 335, 355-356 (1st Cir. 1998), cert. denied ___ U.S. ___, 119 S.Ct. 341; Padilla v. Metro-North Commuter R.R., 92 F.3d 117 (2nd Cir. 1996), cert. denied ___ U.S. ___ , 17 S.Ct. 2453.**

[15] **Hill v. City of Pontotoc, 993 F.2d 422, 424 (5th Cir. 1993) (a fire department).**

[16] **Walsdorf v. Board of Com'rs for E. Jefferson Levee D., 857 F.2d 1047, 1054 (5th Cir. 1988) (a police force); U.S.E.E.O.C. v. Century Broadcasting Corp., 957 F.2d 1446, 1463 (7th Cir. 1992) (radio station announcers).**

[17] **MacDissi v. Valmont Industries, Inc., 856 F.2d 1054, 1060 (8th Cir. 1988); Whittlesey v. Union Carbide Corp., 742 F.2d 724, 727 (2nd Cir. 1984).**

[18] **Whittlesey v. Union Carbide Corp., 742 F.2d at 728, fn. 21.**

[19] **U.S.E.E.O.C. v. Century Broadcasting Corp., 957 F.2d at 1464.**

[20] **Blim v. Western Elect. Co., Inc., 731 F.2d 1473, 1481 (10th Cir. 1984) (Seth, Chief Judge, concurring), cert. denied 469 U.S. 874; Shore v. Federal Express Corp., 777 F.2d 1155, 1160 (6th Cir. 1985).**

[21] **Mason v. Oklahoma Turnpike Authority, 115 F.3d at 1458; Suggs v. ServiceMaster Educ. Food Management, 72 F.3d 1228, 1234-1235 (6th Cir. 1996).**

[22] **Davoll v. Webb, 194 F.3d at 1144. See also Barbour v. Merrill, 48 F.3d 1270, 1280 (D.C. Cir. 1995), cert. dismissed ___ U.S. ___, 116 S.Ct. 1037; Shore v. Federal Express Corp., 777 F.2d at 1160.**

[23] **Shore v. Federal Express Corp., 777 F.2d at 1160.**

[24] **Scarfo v. Cabletron Systems, Inc., 54 F.3d 931, 954 (1st Cir. 1995); Lussier v. Runyon, 50 F.3d 1103, 1106 (1st Cir. 1995), cert. denied __ U.S. ___, 116 S.Ct. 69; Feldman v. Philadelphia Housing Authority, 43 F.3d 823, 833 (3rd Cir. 1994).**

[25] **See Barbour v. Merrill, 48 F.3d at 1280.**

[26] **Davoll v. Webb, 194 F.3d at 1143 (two years) Mason v. Oklahoma Turnpike Authority, 115 F.3d at 1458 (same); Feldman v. Philadelphia Housing Authority, 43 F.3d at 840 (same); U.S.E.E.O.C. v. Century Broadcasting Corp., 957 F.3d at 1463-1464 (EEOC requested two years of frontpay).**